90-1817(1)

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No. 90-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TENNECO RESINS, INC.,
Petitioner,

v.

SHERRIE SIMMERS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether Due Process permits the exercise of personal jurisdiction over a corporation which, at the time of suit, was neither qualified to do nor doing business in Pennsylvania, by imputation of another corporation's contacts in Pennsylvania thirty years before merely because successor liability may be imposed under the law of Pennsylvania.

2. Whether the Full Faith and Credit Clause of the United States Constitution precludes the judicial application of a *de facto* merger theory under Pennsylvania law to treat as a merger a transaction between Delaware corporations made in accordance with Delaware's sale-of-assets statute, Del. Code Ann. tit. 8 § 271 (1983 and Supp. 1990).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are the petitioner Tenneco Resins, Inc. and the respondents Sherrie and Robert A. Simmers, Robert J. Boyer, Children's Hospital of Philadelphia, American Cyanamid Company, Tennessee Gas Pipeline Company (formerly known as Tenneco Inc.), Chromalloy Pharmaceutical, Inc., Forest Laboratories, Inc., Chromalloy American Corporation, Eugene B. Spitz, M.D. and C. Everett Koop, M.D.[1]

STATEMENT PURSUANT TO RULE 29.1

Tenneco Resins, Inc., no longer exists, having filed a Certificate of Dissolution under Delaware law on August 26, 1985.[2] At the time of dissolution, Tenneco Resins, Inc. was a wholly-owned subsidiary of Tenneco Polymers, Inc. Tenneco Polymers, Inc. is a wholly-owned subsidiary of Tenneco Corporation which, in turn, is a wholly owned subsidiary of Tennessee Gas Pipeline Company (formerly known as Tenneco Inc.). In 1987, Tennessee Gas Pipeline Company became a wholly-owned subsidiary of a newly-formed corporation known as Tenneco Inc. At the time of its dissolution, Tenneco Resins, Inc. had no subsidiaries.

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1. In addition, Heyden Products, Inc., Fellows Medical Manufacturing Company, Inc., Radiology Department of Children's Hospital of Philadelphia, Rovena Spenser, M.D., and Joseph Stokes, Jr., M.D. are named in one or both of the Complaints but were never served with original process. Petitioner believes that the corporate entities no longer exist and the individuals are deceased.

2. Del. Code Ann. tit. 8 § 278 (1983 and Supp. 1990) provides that "With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution the action shall not abate by reason of the dissolution of the corporation . . ."

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No. 90-____

IN THE

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TENNECO RESINS, INC.,

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v.

SHERRIE SIMMERS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner Tenneco Resins, Inc. ("TRI") respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion and judgment of the Superior Court of Pennsylvania is reported at 394 Pa. Super. 464, 576 A.2d 376, and is reproduced in the Appendix hereto at A-1. The Order of the Supreme Court of Pennsylvania denying TRI's petition for allowance of appeal is reproduced at A-29 to A-31. The Orders of the Court of Common Pleas of Philadelphia County denying TRI's preliminary objections to the assertion of personal jurisdiction and certifying this issue for appeal are reproduced at A-32 to A-35.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on June 12, 1990. A timely petition for allowance of appeal was filed in the Supreme Court of Pennsylvania on July 6, 1990 which was denied on February 22, 1991. Jurisdiction to review the judgment of the Superior Court of Pennsylvania is conferred upon this Court by 28 U.S.C. § 1257 (1988 Ed.).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the United States Constitution involved are the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ;

and the Full Faith and Credit Clause, U.S. Const. art. IV, § 1:

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. . . .

The statutes involved are 42 Pa. C.S. §§ 5301 and 5322, and Del. Code Ann. tit. 8 §§ 251 and 271. The texts of these statutes are reproduced beginning at A-36.

STATEMENT

In 1987, two product liability actions[3] were filed in the Court of Common Pleas of Philadelphia County against petitioner TRI and several others arising from

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3. *Boyer v. Children's Hospital of Philadelphia, et al.*, Court of Common Pleas of Philadelphia County, February Term, 1987, No. 1135 and *Simmers v. American Cyanamid Company, et al.*, Court of Common Pleas of Philadelphia County, June Term, 1987, No. 26.

the use in 1949 of a radioactive x-ray contrast medium known as Thorotrast.

In the *Boyer* case, Mr. Boyer, a citizen of New Jersey, asserts wrongful death and survival actions arising from an injection of Thorotrast administered to his wife while a patient at the Children's Hospital of Philadelphia in 1949. In the *Simmers* case, Mr. and Mrs. Simmers, also citizens of New Jersey, claim damages arising from a 1949 administration of Thorotrast to Mrs. Simmers at the same hospital.

Thorotrast was manufactured and sold from the early 1930s until 1953 by Heyden Chemical Corporation ("Heyden"). In 1953, Heyden sold its Antibiotics Division and Thorotrast assets to American Cyanamid Company, a company unrelated to Heyden. Following the 1953 transaction, Heyden had no further involvement with Thorotrast and no longer was involved in any way in the manufacture, sale or distribution of Thorotrast.

In 1963, ten years after Heyden divested its Thorotrast assets, TRI purchased from Heyden its remaining assets and assumed certain liabilities. The assets acquired were completely unrelated to Heyden's prior Thorotrast business. TRI thus has never participated in any way whatsoever in the manufacture, sale or distribution of Thorotrast or any similar product in Pennsylvania or elsewhere.

TRI filed Preliminary Objections in both cases seeking dismissal for lack of personal jurisdiction. On October 18, 1988, the court denied these objections and issued orders certifying that the personal jurisdiction issue "presented a substantial, controlling question of both state and constitutional law, one that is a matter of first impression and which warrants immediate appellate review." (A-33 and A-35). On November 7, 1988, TRI filed timely Notices of Appeal in the Superior Court of Pennsylvania and the two cases were consolidated on appeal.

On June 12, 1990, the Superior Court of Pennsylvania affirmed the Court of Common Pleas. Despite the

absence of personal jurisdiction over TRI based on its own contacts, the Superior Court held that Heyden's 1949 jurisdictional contacts in Pennsylvania could be imputed to TRI merely because the substantive law of Pennsylvania *may impose* liability on TRI under a *de facto* merger theory for Heyden's 1949 Thorotrast liabilities.[4] *Simmers v. American Cyanamid Co., et al.*, 394 Pa. Super. 464, 482-489, 576 A.2d 376, 386-389 (1990) (A-17 to A- 24). In so doing, it proclaimed:

> In Pennsylvania, it is now the law that when the successor is subject to the liabilities of its predecessor, the acts of a predecessor corporation may be attributed to its successor for purposes of determining whether jurisdiction is proper. [5]

Simmers, 394 Pa. Super. at 491, 576 A.2d at 390 (A-26).

TRI filed a timely petition for allowance of appeal in the Supreme Court of Pennsylvania. This petition was denied on February 22, 1991. (A-29 to A-31).

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the Superior Court's decision conflicts with the fundamental requirements of due process consistently upheld by this Court as a prerequisite for the assertion of personal jurisdiction over a non-resident defendant. Alternatively, a writ of certiorari should be granted because the Superior Court has decided an important question of

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4. The Superior Court recognized the preliminary nature of its liability determination. See e.g. *Simmers v. American Cyanamid Co., et al.,* 394 Pa. Super. 464, 489 n.16, 576 A.2d 376, 389 n.16 (A-24). TRI contests that it can be liable for any Heyden liabilities arising from the Thorotrast business.

5. In the same decision, the Superior Court further imputed Heyden's 1949 contacts to Chromalloy Pharmaceutical, Inc. ("CPI") under Pennsylvania's widely-criticized "product line" theory of successor liability. CPI also has filed with this Court a petition for a writ of certiorari.

constitutional law which has not been, but now should be, settled by this Court.

I. Contrary To The Decisions Of This Court Which Mandate That The Jurisdictional Inquiry Focus Solely On The Voluntary Contacts Of The Defendant In The Forum State, The Superior Court Of Pennsylvania Has Created A Doctrine Of "Successor Jurisdiction" Which Imputes Jurisdiction Based Upon The Possibility Of Liability

A. The Decision Improperly Exercised Jurisdiction Based On The Contacts Of Another Party

The Superior Court held that Pennsylvania courts may exercise personal jurisdiction over a corporation with no relevant forum contacts itself merely because the substantive law of the Commonwealth may impose successor liability. This decision applying judicially created tort theories of successor liability to create jurisdiction based upon another party's contacts is contrary to this Court's unwavering mandate that Due Process dictates the "minimum contacts" inquiry focus solely on the voluntary contacts of the *defendant* in the forum state.

Since *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), "the constitutional touchstone" for the determination of whether an exercise of personal jurisdiction comports with due process has been "whether the defendant purposefully established 'minimum contacts' in the forum state." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1984), quoting *International Shoe,* 326 U.S. at 316.

Upholding the basic due process requirement that the minimum contacts must be those of the *defendant,* this Court consistently has rejected attempts to shift the minimum contacts inquiry away from the defendant to the forum-related contacts of others. Thus, in *Hanson v. Denckla,* 357 U.S. 235, 253 (1958), this Court held that "it is essential in each case that there be some act by

which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. . ." Likewise, in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985), this Court repeated that "[j]urisdiction is proper. . .where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." (quoting *McGee v. International Life Insurance Co.,* 355 U.S. 220, 223 (1957)) (emphasis in original). Accord *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 112 (1987) ("The 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*") (emphasis in original); *Rush v. Savchuk,* 444 U.S. 320, 332 (1980) (each defendant's contacts with the forum State must be assessed individually).

Since TRI had no voluntary contacts with Pennsylvania upon which jurisdiction could be based, the Superior Court reached back to Heyden's 1949 contacts. It found that:

> Certainly, the Due Process Clause is satisfied as Heyden "purposefully directed" its product Thorotrast at Pennsylvania residents, and the litigation arises directly from the manufacturer [sic] and distribution of the drug. [citations omitted]. Since sufficient "minimum contacts" exist between Heyden and Pennsylvania and those contacts relate directly to the causes of action before us, jurisdiction over TRI was properly exercised by the court below.

Simmers, 394 Pa. Super. at 489, 576 A.2d at 389 (A-24).

The Superior Court supported its imputed jurisdiction, not by considering whether TRI availed itself of the privilege of conducting activities within Pennsylvania, but solely by considering the plaintiffs' perceived needs:

> Plaintiffs must be permitted to establish jurisdiction over a successor corporation based upon its predecessor's contacts with the forum. Otherwise, a corporation which *voluntarily or by the operation of law* assumes its predecessor's liabilities may be able to avoid the jurisdiction of the very forum where the liability accrued simply because it never did business within that forum. This result would be absurd especially when the assets purchased by the successor, at least in part, were derived from the forum and *the successor no doubt had knowledge of its predecessor's presence within the forum.*[6]

Simmers, 394 Pa. Super. at 489-490, 576 A.2d at 389-390 (A-24 to A-25) (emphasis added).

Thus the Superior Court's imputation of Heyden's Pennsylvania contacts to TRI for the purpose of asserting personal jurisdiction conflicts with this Court's decisions.

B. The Decision Improperly Substituted Its Holding Of Potential Liability Under Current Tort Law For The Required Factual Determination That As A Result Of The 1963 Transaction TRI Should Have Reasonably Anticipated Being Haled Into Court In 1987

After holding that modern tort theories of successor liability now will be used to impute jurisdictional contacts in Pennsylvania, the Superior Court belatedly turned its attention to whether TRI should have "reasonably anticipate[d] being haled into court" on this basis. *Simmers,* 394 Pa. Super. at 490, 576 A.2d at 390 (A-25), quoting *Burger King,* 471 U.S. at 474. Thus

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6. Even assuming that TRI had knowledge of Heyden's prior Thorotrast business in Pennsylvania, mere knowledge or awareness does not rise to the purposeful conduct required by the Due Process Clause. *Asahi,* 480 U.S. at 112 ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.")

enlightened by its own ruling, the court instantly found that "[w]hen a successor corporation assumes the liabilities of its corporate predecessors, the successor in effect consents to be held liable in the same locations where its predecessor would have been exposed, i.e. consents to the same jurisdictional qualities of its predecessor." *Id.* The Superior Court further opined that "[n]o doubt in today's sophisticated world of corporate takeovers, a corporation, which assumes another's liabilities or purchases another's product line, seriously considers the possible extent of any liabilities and where those liabilities exist." *Id.* Thus, with perfect circular reasoning, the Superior Court began and ended its due process analysis without specific reference to TRI.

In *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), this Court held that "the foreseeability that is crucial to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[7] However, the Superior Court omitted from its discussion the fact that the *1963* TRI/Heyden agreement was not made "in today's sophisticated world of corporate takeovers." *Simmers,* 394 Pa. Super. at 490, 576 A.2d at 390 (A-25). Similarly, the *de facto* merger theory of successor liability upon which the Superior Court relied to create jurisdiction over TRI was not applied in Pennsylvania until 1974.[8] Nor was TRI ever involved with the Thorotrast product line, which had been sold by Heyden ten years prior to the 1963 transaction.

In place of any factual analysis of whether TRI should have reasonably anticipated being haled into court for Heyden's 1949 Thorotrast liabilities, the Superior Court substituted broad generalizations based upon

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7. 444 U.S. at 297 (citations omitted).

8. *See Knapp v. North American Rockwell Corp.,* 506 F.2d 361 (3d Cir. 1974) (predicting Pennsylvania Supreme Court would adopt *de facto* merger theory of successor liability).

its own untenable holding. The Superior Court failed to apply the "critical . . . due process analysis," *World-Wide Volkswagen,* 471 U.S. at 474, and, thus, its decision conflicts with the decisions of this Court.

C. The Decision Improperly Based Jurisdiction On A Contract Unrelated To The Forum

Key to the Superior Court's decision was the potential legal significance it placed on the 1963 agreement by which TRI purchased Heyden's remaining assets. Applying Pennsylvania substantive liability law, the Superior Court concluded that a sufficient showing had been made to find preliminarily that TRI could be liable for Heyden's 1949 Thorotrast liabilities under a *de facto* merger theory of successor liability. Thus, the Superior Court held that successor liability arising from the 1963 TRI/Heyden contract was a sufficient basis to impute to TRI Heyden's 1949 jurisdictional contacts in Pennsylvania. Assuming, *arguendo,* that the 1963 agreement would support the imposition of successor liability on TRI, the Superior Court's reliance on that agreement to assert personal jurisdiction over TRI is contrary to this Court's decision in *Rush v. Savchuk,* 444 U.S. 320 (1980).

In *Rush v. Savchuk,* this Court rejected the argument that the existence of an insurance contract providing coverage to a non-resident defendant for plaintiff's negligence claim was a sufficient basis for the assertion of jurisdiction over the defendant. In applying the requirement of *Shaffer v. Heitner,* 433 U.S. 186 (1971), that the due process inquiry must focus on "the relationship among the defendant, the forum, and the litigation,"[9] this Court held that the existence of the insurance policy could not establish the requisite contacts between the litigation and the forum because ". . . contractual arrangements . . . do not affect the court's

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9. 433 U.S. at 204.

jurisdiction unless they demonstrate ties between the defendant and the forum." *Rush,* 444 U.S. at 329.

The 1963 agreement between TRI and Heyden, both Delaware corporations, is unrelated to Pennsylvania. The agreement does not, therefore, provide any contacts or demonstrate any ties between TRI and the forum. Accordingly, the Superior Court's reliance on the 1963 agreement as the basis of asserting personal jurisdiction over TRI is in conflict with this Court's rulings.

D. The Decision Failed To Give Full Faith And Credit To The Delaware Law Governing The 1963 Transaction

In addition to the due process implications, the Superior Court's reliance on a *de facto* merger theory to treat as a merger for jurisdictional purposes the 1963 TRI/Heyden asset purchase agreement conflicts with this Court's decisions interpreting the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, §1.

Delaware's role as the state of incorporation of all of the relevant entities to the 1963 TRI/Heyden agreement requires that its laws governing the transaction be given full faith and credit under United States Constitution. See *Order of United Commercial Travelers v. Wolfe,* 331 U.S. 586 (1947), and *Sovereign Camp v. Bolin,* 305 U.S. 66 (1938), in which this Court held that the Full Faith and Credit Clause required state courts to follow the laws of the states under which entities in question were organized. See also *Canada Southern R.R. Co. v. Gebhard,* 109 U.S. 527, 538 (1883) (". . . [A]nything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere").

Delaware has enacted a comprehensive statutory scheme permitting its corporations to change their corporate structures and the ownership of corporate assets.

The Delaware Supreme Court has rejected a judicial melding of the discrete statutory requirements for a sale of assets and for a merger. Where as here, the requirements of the Delaware sale-of-assets statute, Del. Code Ann. tit. 8 § 271, have been followed, that court has refused to consider a transaction to be a *de facto merger,* such as would require satisfaction of the statutory requirements for mergers.[10] *Hariton v. Arco Electronics, Inc.,* 188 A.2d 123 (Del. 1963); *Heilbrunn v. Sun Chemical Corp.,* 150 A.2d 755 (Del. 1959).

The Superior Court's characterization of the 1963 TRI/Heyden transaction as a *de facto* merger under Pennsylvania law fails to give full faith and credit to Delaware statutes and decisions, and, thus, conflicts with this Court's decisions.

II. The Superior Court Has Decided An Important Question Of Constitutional Law Which Should Be Settled By This Court

The Superior Court's decision raises important questions of constitutional law which have not been directly addressed by this Court. The significance of the Superior Court's holding is as plain as it is broad:

> In Pennsylvania, it is now the law that when the successor is subject to the liabilities of its predecessor, the acts of a predecessor corporation may be attributed to its successor for the purpose of determining whether jurisdiction is proper.

Simmers, 394 Pa. Super. at 491, 576 A.2d at 390 (A-26). Thus, the Superior Court transformed the constitutional due process inquiry into one of successor liability which, in turn, is based on the shifting social policies which underlie substantive tort law.

The proliferation of corporate transactions resulting in successor liability under differing state laws assures this issue will arise with increasing frequency. Already, the Superior Court's broad holding has been adopted by the Fourth Circuit Court of Appeals in *City of Richmond, VA v. Madison Management Group,* 918 F.2d

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10. Del. Code Ann. tit. 8 § 251 (1983 and Supp. 1990).

438, 454 (4th Cir. 1990) which, in turn, has been followed by the Tenth Circuit Court of Appeals in *Williams v. Bowman Livestock Equipment Company,* 927 F.2d 1128 (10th Cir. 1991). Other courts which have addressed this constitutional issue have reached conflicting results[11], even in cases involving Heyden, Thorotrast and TRI.[12]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 23, 1991

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11. *See e.g. Johnston v. Pneumo Corp.,* 652 F. Supp. 1402, 1406 (S.D. Miss. 1987) ("This Court declines to hold that contacts with a forum may be attributed or imputed to a successor corporation simply because that corporation purchases assets and liabilities. The law is established that each defendant's contacts with the forum state must be assessed on an *individual basis.*") (emphasis in original).

12. *See e.g. Sullivan v. Fellows Testagar & Co.,* 518 So. 2d 1111 (4th Cir. La. App. 1987) (no personal jurisdiction over TRI); *Tango v. The Cleveland Clinic Foundation,* No. 95606 Slip Op. (C.C.P. Cuyahoga County, Ohio, April 2, 1986) (no personal jurisdiction over TRI) (reproduced at A-47); *Bouley v. American Cyanamid Co.,* No. CA-85-4368-2, Slip. Op., 1987 U.S. Dist. Lexis 9631 (D. Mass., Oct. 21, 1987) (personal jurisdiction over TRI).

APPENDIX

Sherrie SIMMERS and Robert A. Simmers, W/H and Robert S. Simmers, a Minor, by His Parents and Natural Guardians, Sherrie Simmers and Robert A. Simmers, W/H

v.

AMERICAN CYANAMID CORPORATION, Tenneco, Inc., Tenneco Resin, Inc., Fellows Medical Manufacturing Company, Inc., Chromalloy American Corporation, Chromalloy Pharmaceutical, Inc., Forrest Pharmaceutical Laboratories, Inc., Heyden Products, Inc., the Children's Hospital of Philadelphia, Radiology Department of the Children's Hospital of Philadelphia, Rovena Spenser, M.D., C.E. Koop, M.D. and Joseph Stokes, Jr., M.D. (Two Cases)

Appeal of TENNECO RESINS, INC. (Two Cases)

Robert J. BOYER, Individually and as Executor of the Estate of Marsha F. Boyer, Deceased

v.

CHILDREN'S HOSPITAL OF PHILADELPHIA, Heyden Products, American Cyanamid Corp., Tenneco, Inc., Tenneco Resin, Inc. (Formerly "Tenneco Chemical Co"), Fellows Medical Manufacturing Co., Inc., Chromalloy Pharmaceutical, Inc., Forrest Pharmaceutical Laboratories, Inc., Chromalloy American Corporation and Eugene B. Spitz, M.D. (Two Cases)

Appeal of CHROMALLOY PHARMACEUTICAL, INC. (Two Cases)

Superior Court of Pennsylvania.

Argued Oct. 25, 1989.
Filed June 12, 1990.

Before MONTEMURO, POPOVICH and CERCONE, JJ.

POPOVICH, Judge:

In this consolidated appeal, we are presented with a question of first impression in Pennsylvania – whether the forum-related contacts and actions of a predecessor corporation may be attributed to its successor for the purposes of establishing in personam jurisdiction.

Herein, appellants, Tenneco Resins, Inc. and Chromalloy Pharmaceutical, Inc., (hereafter "TRI" and "CPI" respectively) challenge the in personam jurisdiction of the Court of Common Pleas of Philadelphia.[1] To appreciate fully the complexity of this case, a thorough recitation of the underlying facts is necessary, including a history of the product Thorotrast and its corporate lineage.

Thorotrast is the pharmaceutical brand name for colloidal thorium dioxide which is a radioactive contrast dye medium used to perform diagnostic x-rays. By the late 1940's and continuing to the present date, scientific literature and FDA regulations concerning the use of thorium dioxide products explained the medical risks of using Thorotrast, especially an increased risk of cancer.[2]

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1. Our review of the lower court's determination has been complicated by the terseness of the court's orders sustaining jurisdiction. The lower court, ***without an opinion*** espousing the theory/theories serving as the basis of its decisions, found that the Philadelphia Court of Common Pleas could exercise in personam jurisdiction over both appellants. He then entered orders declaring, "the question of In Personam jurisdiction presents a substantial, controlling question of both state and constitutional jurisdictional law, one that is a matter of first impression and which warrants immediate appellate review." We strongly urge the trial court, when faced with future jurisdictional questions, to provide this court with an opinion outlining the factual and legal bases for its decision, rather than simply certifying the issue for appeal. However, rather than remand for explanation of the lower court's decision, we will address the various theories of in personam jurisdiction raised by the plaintiffs-appellees to the extent necessary.

2. See Taft, Editorial: Prium Non Nocere, 51 Radiology 875 (1948); Budin, E. and Gershon-Cohen, J., *The Danger of Cancer from Thorotrast as a Diagnostic Medium*, 75 Am.J. of Roent. 1183 (1956); Council on Pharmacy and Chemistry, Report on Thorotrast,

The genealogy of the Thorotrast product line and its manufacturers is complex and is the single most important factor in resolution of the question of jurisdiction.[3] The commercial use of Thorotrast as an x-ray contrast dye was pioneered by the Von Heyden Company of Germany in the early 1930's. At the same time, Heyden Chemical Corporation, a New York Corporation, began to distribute Thorotrast in the United States, including the Philadelphia area where the drug was administered at defendant Children's Hospital, among other medical facilities.

In 1953, Heyden sold its antibiotics division to American Cyanamid, including all trademarks, patents, goodwill and business relating to Thorotrast. The November 3, 1953 sales agreement, in part, provided:

> [*ARTICLE IV,* A(l)] CYANAMID shall: (1) Duly assume as of the closing provided for herein all obligations of HEYDEN thereafter arising under all licenses, rights, permits, leases, agreements and contracts assigned by HEYDEN to CYANAMID pursuant to this Agreement; provided, however, that with respect to any thereof not identified in the Exhibits attached hereto CYANAMID shall have the option of reassigning the same to HEYDEN, such option to be exercised by notice to HEYDEN within two (2) weeks after an officer of CYANAMID shall have notice thereof.[4]

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99 J.Amer.Med.Assoc. 2183; Looney, William B., et al., *Late Follow-up Studies after Internal Deposition of Radioactive Materials,* 160 J.Amer.Med.Assoc. 1 (1956); 25 C.F.R. § 3.36 (1965); Hoffer, P.B., Introduction: Voices from The Past; *A Brief History of Thorotrast,* 1988 Yearbook of Nuclear Medicine, pp. 13-20 (1988).

3. To aid the reader, included in this opinion as Appendix A is a flow chart outlining the relationships between the various companies which are related in any way to Thorotrast. This chart was originally attached to appellees' brief as Exhibit E.

4. The sales agreement specifically assigned all rights to Thorotrast related patents to American Cyanamid.

> [*ARTICLE V.*, B.] HEYDEN: agrees to indemnify, defend and save CYANAMID and/or their successors and assigns harmless from and against any and all claims of whatsoever nature, including the cost of any litigation thereof, arising out of or in connection with the operation of and conduct by HEYDEN of the business of its Antibiotic Division prior to the closing date hereunder, including, without limitation, claims for infringement of patents, defaults in performance of contract obligations, nuisance claims and claims or liability arising through violation of any law or governmental regulation.

After the sale, Heyden continued in business but no longer made or sold Thorotrast.

In 1954, American Cyanamid sold its Thorotrast product line to Testagar and Company.[5] Appellees allege that as early as 1949, Testagar distributed Heyden's Thorotrast product line. However, the earliest delivery of Thorotrast by Testagar into Pennsylvania documented in the record occurred in 1961.

In 1962, Testagar underwent a statutory consolidation and became part of the Fellows Medical Manufacturing Company. In 1971, Fellows was merged into FMM, Inc., a wholly owned subsidiary of Chromalloy American Corporation. Later the same year, FMM changed its corporate name to Fellows Medical Manufacturing Corporation, Inc., a Delaware Corporation. The Thorotrast product line was passed to each new

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5. In *Bouley v. American Cyanamid Company, et al.*, Slip Opinion, No. 85-4368-Z (D. Mass. Oct. 21, 1987), available at 1987 WESTLAW 18738, Judge Zobel noted that the Cyanamid-Testagar sales agreement contained a hold-harmless clause under which Testagar agreed to indemnify Cyanamid "against any claim for personal injuries, damages or destruction of property . . . arising out of this agreement, the use, handling or inherent characteristics of the materials sold hereunder." *Bouley*, Slip Op. at 10.

corporate entity in succession; each, in turn, manufactured the drug and distributed it to the medical profession, including that of Pennsylvania.

Late in 1973, Chromalloy American incorporated Chromalloy Pharmaceuticals, Inc., appellant CPI. In 1974, CPI became the surviving corporation following a statutory consolidation of numerous Chromalloy American subsidiaries, including Fellows Medical Manufacturing Corporation. While it appears that CPI never manufactured or distributed Thorotrast, CPI, through its O'Neil, Jones and Feldmen Division, had filed a New Drug Application for Thorotrast with the Food and Drug Administration. However, in 1977, CPI withdrew its Thorotrast application. Subsequent thereto, portions of CPI were sold to Forest Laboratories, including the O'Neil, Jones and Feldmen Division which then controlled the Thorotrast line.

Meanwhile, in 1957, Heyden changed its name to Heyden Newport Chemical Corporation. In June of 1963, the Tennessee Gas Transmission Company, commonly known as Tenneco, Inc., acquired all of the assets and liabilities of Heyden Newport by means of a wholly owned subsidiary known as HDN Corporation, a Delaware corporation, created for such purpose. The "Plan of Reorganization," executed by Heyden Newport, Tenneco and HDN, provided: 1) All of Heyden Newport's assets, properties, business and goodwill were to be transferred to HDN in exchange solely for shares of $5.00 par value common stock of Tenneco owned or to be owned by HDN; and 2) Heyden Newport would then dissolve and distribute the Tenneco shares to stockholders of Heyden. In October of 1963, the parties completed the corporate acquisition of Heyden Newport. Heyden Newport then transferred to HDN all of its assets, properties, business and goodwill including the right to use the name Heyden Newport Chemical Corporation for which HDN executed and delivered to Heyden Newport an "Assumption Agreement" under which HDN agreed to pay, perform and discharge, all debts,

obligations, contracts and liabilities of Heyden Newport of any kind, character or description, whether accrued, absolute, contingent or otherwise, and whether or not reflected or reserved against on the financial statements of Heyden Newport. Immediately thereafter, Heyden Newport changed its name to Denport Corporation, underwent voluntary dissolution under Delaware corporate law and distributed the Tenneco shares to its stock holders.

In turn, HDN changed its name to Heyden Newport Chemical Corporation, then to Tenneco Chemicals, Inc., and then again to Tenneco Resins, Inc., appellant TRI. The management of former Heyden Newport was retained as a part of the sales agreement. From the moment of their incorporation, TRI and its predecessors in interest were either qualified to do business as a foreign corporation in Pennsylvania or were carrying on a continuous and systematic part of their business in the Commonwealth until TRI voluntarily surrendered its certificate to do so on June 11, 1984. Thereafter, on August 26, 1985, TRI, pursuant to Delaware law, filed a certificate of dissolution.

The Boyer case is a wrongful death and survival action filed on behalf of the estate of Marsha Boyer and her surviving family. On or about April 19, 1949, Marsha Boyer, then five months old, was administered the drug Thorotrast in Children's Hospital of Philadelphia. She first learned of the presence of Thorotrast in her system in February of 1985. Marsha Boyer died on April 26, 1986, at Broad Street Hospital in Philadelphia from a cancer-related illness which appellees allege was induced by Thorotrast. Throughout her life, Mrs. Boyer was a resident of New Jersey, and, at the time of her death, she resided in Stone Harbor, New Jersey.

The Simmers case is factually similar to the Boyer case. Herein, Sherrie Simmers alleges that as a result of the administration of Thorotrast to her on May 31, 1949, at Children's Hospital of Philadelphia, she currently suffers from numerous serious maladies including, but

not limited to, fibrosis, lymphatic obstruction with secondary lymphedema and an increased risk of contracting cancer of the bone marrow, liver, kidneys and spleen. Sherrie Simmers, who is also a lifetime resident of New Jersey, learned of her Thorotrast problem in 1986. Neither Thorotrast recipient was ever advised of the inherent problems of Thorotrast by any of the defendants below.

[1] Herein, appellants contend that the forum-related actions contacts and actions of a predecessor corporation may not be attributed to its successor in interest; instead jurisdiction must be based on the forum-related activity of the defendant *itself*. We disagree and hold that the predecessor's activities may be attributed to the successor for jurisdictional purposes.[6]

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6. Although appellees raised numerous theories of jurisdiction below, we need only address the inextricably intertwined issues of successor liability and personal jurisdiction. However, for the reader's benefit, we will list the jurisdictional issues as set forth by appellees.

I. The lower court correctly concluded that Pennsylvania has personal jurisdiction over TRI based upon:

A. TRI's formal qualification as a foreign corporation in this Commonwealth between August 18, 1963 and June 11, 1984;

B. TRI's constructive presence in Pennsylvania by virtue of the attribution of its predecessor in interest's (Heyden Newport Chemical Company) contacts with Pennsylvania in general and regarding Thorotrast in particular; and/or

C. TRI's own alleged tortious acts and activities towards Thorotrast victims related to this Commonwealth following its acquisition of Heyden and its specific undertaking to fulfill and perform all of Heyden's obligations and liabilities.

II. The lower Court correctly concluded that Pennsylvania has personal jurisdiction over CPI based upon:

A. CPI's constructive presence in Pennsylvania by virtue of its corporate predecessor's (Testagar and Company) alleged sale and distribution of Thorotrast to Children's hospital;

B. CPI's constructive presence in Pennsylvania by virtue of its predecessor in interest's (Heyden Newport Chemical Company) contacts with Pennsylvania in general and regarding Thorotrast in particular; and/or

C. CPI's own alleged tortious acts and activities toward

Generally, "[j]urisdiction over a nonresident defendant may be based either upon the specific acts of the defendant which gave rise to the cause of action, or upon the defendant's general activity within the forum state." *Skinner v. Flymo, Inc.*, 351 Pa.Super. 234, 239, 505 A.2d 616, 619 (1986) citing, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 15, 105 S.Ct. 2174, 2182 n. 15, 85 L.Ed.2d 528, 541 n. 15 (1985); *Bork v. Mills*, 458 Pa. 228, 329 A.2d 247 (1974); *Rogers v. Rogers*, 295 Pa.Super. 160, 441 A.2d 398 (1982); *Bianco v. Concepts "100", Inc.*, 291 Pa.Super. 458, 436 A.2d 206 (1981).

[2] When jurisdiction is based upon a foreign corporation's *general activity* or consent, i.e., when the corporation has "continuous and substantial contacts" with Pennsylvania or has voluntarily registered itself to do business here, the courts of this Commonwealth may exercise jurisdiction over the foreign corporation regardless of whether the cause of action being prosecuted is related to the corporation's activities in Pennsylvania. 42 Pa.C.S.A. § 5301.[7] *Bork v. Mills*, 458 Pa. at 230, 329

NOTES *(Continued)*

Thorotrast victims in this Commonwealth subsequent to its acquisition of Heyden's product line.

7. § 5301. Persons

(a) **General rule.**—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

* * * * * *

(2) Corporations.—

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

* * * * * *

(b) **Scope of jurisdiction.**—When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section.

A.2d at 249; *Skinner v. Flymo, Inc.,* 351 Pa.Super. at 239, 505 A.2d at 619; *Slota v. Moorings, Ltd.,* 343 Pa.Super. 96, 104-108, 494 A.2d 1, 5-6 (1985); *Whalen v. Walt Disney World Co.,* 274 Pa.Super. 246, 250, 418 A.2d 389, 391 (1980); See also: *Burger King Corp. v. Rudzewicz,* 471 U.S. at 473 n. 15, 105 S.Ct. at 2182 n. 15.

[3] Moreover, when a foreign corporation, which was subject to the general personal jurisdiction of Pennsylvania tribunals, subsequently ceases to do continuous and systematic business in Pennsylvania or withdraws its qualifications as a foreign corporation in this Commonwealth, Pennsylvania's jurisdiction over the foreign corporation is not defeated with respect to any act, transaction or omission which occurred during the previous period. 42 Pa.C.S.A. § 5301(b), *supra; Slota v. Moorings, Ltd., supra; Mobay Chemical Corp. v. Air Products, etc.,* 290 Pa.Super. 489, 495, 434 A.2d 1250, 1253 (1981); *Fischman v. Fischman,* 470 F.Supp. 980 (E.D.Pa.1979). Accord, *Burger King Corp. v. Rudzewicz,* 471 U.S. at 473 n. 15, 105 S.Ct. at 2182 n. 15.

[4] When jurisdiction is based upon a foreign corporation's specific act or acts related to the forum, the propriety of exercising jurisidiction over a non-resident is predicated upon the following two considerations: 1) Jurisdiction must be conferred by the Commonwealth's "long-arm" statute, 42 Pa.C.S.A. § 5322[8] and 2) The

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Discontinuance of the acts enumerated in subsection (a)(2)(i) and (iii) . . . shall not affect jurisdiction with respect to any act, transaction or omission during the period such status existed.

8. *§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth.*

(a) General rule.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative or a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in

exercise of jurisdiction must survive constitutional review under the Due Process Clause of the United States Constitution. *Asahi Metal Industry Co. v. Superior*

NOTES *(Continued)*

this Commonwealth, any of the following shall constitute transacting business for the purposes of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing and object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

* * * * * *

(b) Exercise of full constitutional power over non residents.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of jurisdiction.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

* * * * * *

(e) Inconvenient forum.—When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

Court, 480 U.S. 102, 108-109, 107 S.Ct. 1026, 1031-1033, 94 L.Ed.2d 92 (1987); *Burger King Corp. v. Rudzewicz,* 471 U.S. at 470-478, 105 S.Ct. at 2181-2185; *Skinner v. Flymo, Inc.,* 351 Pa.Super. at 239, 505 A.2d at 619; *Hewitt v. Eichelman's Subaru, Inc.,* 341 Pa.Super. 589, 492 A.2d 23 (1985).

The Court, in *Skinner v. Flymo, Inc., supra,* set forth the applicable constitutional guidelines to be employed when determining whether the requirements for specific act jurisdiction have been met as follows:

> . . . Where the forum state seeks to assert specific jurisdiction over an out-of-state defendant, who has not consented to be sued there, the Due Process Clause of the Fourteenth Amendment to the United States Constitution "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz, supra at* 472, 105 S.Ct. at 2182, 85 L.Ed.2d at 540-541 (citation omitted). See: *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 413-414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404, 411 (1984). The critical question in determining whether the defendant has purposefully directed his activities at residents of the forum is not whether it was foreseeable that defendant's activities would have an injurious effect in the forum state, but whether the defendant's conduct and his connection with the forum state were such that he could reasonably anticipate being "haled" into court there. *Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at 474, 105 S.Ct. at 2183, 85 L.Ed.2d at 542; *United Farm Bureau Mutual Insurance Co. v. United States Fidelity and Guaranty Co.,* 501 Pa. 646, 657, 462 A.2d 1300, 1305 (1983), quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 294, 100 S.Ct. 559, 565-566, 62 L.Ed.2d 490, 501 (1980). This question, in turn,

must be resolved by examining the defendant's contacts with the forum state.

> The Due Process Clause permits a state to exercise in personam jurisdiction over a nonresident defendant when there exist "certain minimum contacts" between the defendant, the forum state, and the litigation. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790, 797-798 (1984); *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804, 811 (1984); *Helicopteros Nacionales de Columbia, S.A. v. Hall, supra*, 466 U.S. at 413-414, 104 S.Ct. at 1872, 80 L.Ed.2d at 411; *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945); *Kenny v. Alexson Equipment Co.*, 495 Pa. 107, 117-118, 432 A.2d 974, 980 (1981); *Slota v. Moorings, Ltd., supra*, 343 Pa.Super. at 102-103, 494 A.2d at 3. . . .

Random, fortuitous, or attenuated contacts between the forum state will not support an exercise of jurisdiction. [*Burger King Corp. v. Rudzewicz*, 471 U.S.] at 475, 105 S.Ct. at 2183, 85 L.Ed.2d at 542; *Keeton v. Hustler Magazine, Inc., supra*, 465 U.S. at 774, 104 S.Ct. at 1478, 79 L.Ed.2d at 797; *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 299, 100 S.Ct. at 568, 62 L.Ed.2d at 502. Jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* which create a 'substantial connection' with the forum State. *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 475, 105 S.Ct. at 2184, 85 L.Ed.2d at 542 (emphasis in original). See: *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226 (1957). . . .

"Once it has been decided that a defendant purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal

jurisdiction would comport with 'fair play and substantial justice.' " [*Burger King Corp. v. Rudzewicz,* 471 U.S.] at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543. Factors to be considered include " 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' " *Id.* at 477, 105 S.Ct. at 2184, 85 L.Ed.2d at 543, quoting *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 292, 100 S.Ct. at 564, 62 L.Ed.2d at 498.

These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accomplished through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat jurisdiction even if the defendant has purposefully engaged in forum activities.

Burger King Corp. v. Rudzewiez, supra, 471 U.S. at 477-478, 105 S.Ct. at 2184-2185, 85 L.Ed.2d at 543-544 (citations omitted).

Skinner v. Flymo, Inc., 351 Pa.Super. at 240-244, 505 A.2d at 619-621.

In determining whether the lower court properly exercised jurisdiction over the appellants, we must determine whether it is a violation of our long arm statute and the Due Process Clause of the United States Constitution to attribute the forum contacts of a predecessor corporation to its successor for jurisdictional purposes. We believe our long arm statute is not violated and, more importantly, due process is not offended by such a judicial action.

Appellees cite a growing line of cases which hold that, under certain circumstances, a court may exercise jurisdiction over a successor corporation based upon the actions of its predecessor. *Duris v. Erato Shipping,* 684 F.2d 352 (6th Cir.1982), *aff'd sub nom., Pallas Shipping Agency, Ltd. v. Duris,* 461 U.S. 529, 103 S.Ct. 1991, 76 L.Ed.2d 120 (1983); *Bowers v. Neti Technologies,* 690 F.Supp. 349 (E.D.Pa.1988); *Goffe v. Blake,* 605 F.Supp. 1151 (D.Del.1985); *United States v. Bliss,* 108 F.R.D. 127 (E.D.Mo.1985); *Cole v. Caterpillar Machinery Corp.,* 562 F.Supp. 179 (M.D. La.1983); *Fehl v. S.W.C. Corp.,* 433 F.Supp. 939 (D.Del.1977); *Maryland National Bank v. Shaffer Stores Co.,* 240 F.Supp. 777 (D.Md.1965).

In response, appellants argue that this line of cases only applies when a statutory merger is involved, which is *not* the case of either appellant. In support of their argument, appellants cite *Johnston v. Pneumo Corp.,* 652 F.Supp. 1402 (S.D.Miss.1987), *Sullivan v. Fellows Testagar and Company, Inc.,* 518 So.2d 1111 (4th Cir. La.App. 1987) and *Tango v. The Cleveland Clinic Foundation,* No. 95606 Slip Op. (C.C.P., Cuyahoga Co., Ohio April 2, 1986). We decline to follow these cases. As we will discuss *infra,* the great weight of persuasive authority permits imputation of a predecessor's actions upon its successor *whenever* forum law would hold the successor liable for its predecessor's actions, even though the new

corporate entity is not the result of a statutory merger or consolidation.[9]

Appellants further argue that "various theories of liability add nothing to the jurisdictional inquiry." Quoting *Witt v. Scully,* 539 F.2d 950 (3rd. Cir.1976), appellants argue, "The law which must be applied to the issue [of jurisdiction] . . . is not the aggregate of the legal precepts which substantively may impose liability on a defendant. Rather, the applicable legal precepts are jurisdictional ones, wholly statutory in this case. The result turns solely upon whether defendant's conduct brings him within the terms of the Pennsylvania long arm statute." *Witt v. Scully,* 539 F.2d at 951- 952.[10] See also *Chromalloy v. Clair Polishing Company, Inc.,* No. 85-6021, Slip Op. (E.D.Pa., May 21, 1986) available at 1986 WESTLAW 5823.

[5] However, we disagree and quote with approval Judge Caleb M. Wright who stated, "Certain principles of the substantive law with respect to the assumption by successor corporations of products liability are relevant to this jurisdictional question . . . Common to the scope of both jurisdiction and liability is the fairness of making a corporation which enjoys the benefit of business within the state [i.e. assets of its predecessor derived from business within the state] answerable in that jurisdiction for wrongdoing associated with that business." *Fehl v. S.W.C. Corp.,* 433 F.Supp. at 945. Further, Judge Wright stated, "The rationale of the substantive

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9. We note that, generally, the facts of the cases cited by appellee in favor of jurisdiction and relied upon by this court revolve around statutory mergers or consolidation, although the discussion of the issue in each case does not limit itself only to that situation. In *Sullivan v. Fellows Testagar, supra,* the Louisiana Court of Appeals rejected the very argument which we now embrace and found that TRI was not Heyden's successor. We are unpersuaded by the *Sullivan* court's analysis of the facts, and as the discussion *infra* will demonstrate, TRI was by means of a *de facto* merger, the successor to Heyden and liable for Heyden's acts.

10. We note that in *Witt v. Scully, supra,* the Third Circuit was not required to address the issues before us.

liability [successor liability] cases, in Delaware and elsewhere, is *equally applicable* to the problem of personal jurisdiction." *Fehl v. S.W.C. Corp.*, 433 F.Supp. at 947 (emphasis added). In view of the similarity of concerns with respect to jurisdiction and liability, certain analogies between the law of successor liability are useful to determine whether a predecessor corporation and its successor are one and the same for jurisdictional purposes.[11]

[6, 7] The general rule governing successor liability in Pennsylvania is set forth in *Dawejko v. Jorgenson Steel Co.*, 290 Pa.Super. 15, 434 A.2d 106 (1981). Generally, when a company sells or transfers all of its assets to a successor, the successor does *not* acquire the liabilities of the transferor merely because of its succession to the transferor's assets. *Dawejko v. Jorgenson Steel Co.*, 290 Pa.Super. at 18, 434 A.2d at 107. See also *Knapp v. North American Rockwell*, 506 F.2d 361 (3rd Cir. 1974), *cert. denied* 421 U.S. 965, 95 S.Ct. 1955, 44 L.Ed.2d 452 (1975). However, the general rule does not apply and liability attaches to the successor when one of the following is shown:

1) The purchaser expressly or impliedly agrees to assume such obligation;

2) The transaction amounts to a consolidation or merger;

3) The purchasing corporation is merely a continuation of the selling corporation;

4) The transaction is fraudulently entered into to escape liability;

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11. In using *Dawejko v. Jorgenson Steel Co.*, 290 Pa.Super. 15, 434 A.2d 106 (1981), we simply apply by analogy the law of successor liability to that of personal jurisdiction in order to make the preliminary determination of whether, based on the facts as they have been developed at this early stage of litigation, the successor corporations should stand in the shoes of their predecessor/s.

5) The transfer was not made for adequate consideration and provisions were not made for the creditors of the transferor.

6) The successor undertakes to conduct the same manufacturing operation of the transferor's product lines in essentially an unchanged manner. The successor is then strictly liable for injuries caused by defects in the product line, even if previously manufactured and distributed by the transferor.

Dawejko v. Jorgenson Steel Co., 290 Pa. Super. at 18, 23, 434 A.2d at 107, 110. See also *Philadelphia Electric Company v. Hercules, Inc.*, 762 F.2d 303 (3rd Cir.1985) (applying Pennsylvania successor liability law).

Instantly, the plaintiffs have demonstrated that TRI by means of a *de facto* merger had become the corporate embodiment of Heyden. As previously described, Tenneco acquired all of the assets and liabilities of Heyden Newport in 1963. In exchange for Tenneco stock owned by HDN, Heyden transferred all its assets and liabilities to HDN Corporation, a wholly-owned subsidiary of Tenneco created for the purpose of acquiring Heyden Newport. Heyden Newport then changed its name to Denport Corporation and dissolved, immediately distributing its Tenneco shares to the former Heyden shareholders. In turn, HDN changed its name to Heyden Newport Chemical Corporation, then to Tenneco Chemicals and eventually to TRI. The fact that a *de facto* merger occurred is particularly evident when we consider that after the transaction between Tenneco and Heyden Newport, the new corporation transacted business under its former name for a period of time, all of Heyden Newport's corporate officers were retained by the new entity and the sales agreement provided Heyden Newport had to dissolve itself and distribute its Tenneco stock. See *Elmer v. Tenneco Resins, Inc.*, 698 F.Supp. 535 (D.Del.1988) ("the Court finds that there is a question whether HDN impliedly assumed any Thorotrast liability of Heyden . . . It could reasonable be inferred . . . , that HDN agreed to assume any and all

liabilities of Heyden . . ."); *Gee v. Tenneco, Inc.,* 615 F.2d 857, 863 (9th Cir.1980) (Tenneco documents are reasonably susceptible to conflicting interpretations and whether HDN assumed Thorotrast liabilities of Heyden is a question of fact).

[9] In *Gee v. Tenneco, Inc.,* 615 F.2d at 864, the Ninth Circuit, citing dicta from the California case of *Ray v. Alad Corp.,* 19 Cal.3d 22, 560 P.2d 3, 136 Cal.Rptr. 574 (1977), stated "it would appear that the [Heyden-Tenneco] transaction falls within the *de facto* merger doctrine." However, the Court, bound by its standard of review, refused to overturn summary judgment on this issue because it was not absolutely certain that the dicta in *Ray v. Alad Corp., supra,* concerning the *de facto* merger doctrine was the law of California. We need not hypothesize about Pennsylvania law regarding *de facto* merger; successor liability is imposed when the consideration for the purchase of assets consists wholly of shares of the purchaser's stock which are then promptly distributed to the seller's shareholders in conjunction with seller's liquidation. *Shannon v. Samuel Langston Company,* 379 F.Supp. 797, 801 (W.D. Mich.1974). See also *Philadelphia Electric Company v. Hercules, Inc.,* 762 F.2d 303 (3rd Cir.1985); *Martin v. Johns-Manville Corp.,* 322 Pa.Super. 348, 371, 469 A.2d 655, 667 (1983).[12] This is exactly what happened *sub judice.*

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12. In *Martin v. Johns-Manville, supra,* we stated, "We believe, however, that in some circumstances a successor should be held accountable for the recklessness of its predecessor. This will be so when the goals that underlie the imposition of punitive damages — punishment and deterrence — will be advanced. In this regard, we may draw from the various formulations of the rule permitting the imposition of successor liability when the successor is a mere "continuation" of its predecessor." Citing *Shannon v. Samuel Langston Co., supra.*

[10] Similarly, we find that CPI is subject to the jurisdiction of Pennsylvania courts. In 1954, Testagar purchased the Thorotrast product line from American Cyanamid and manufactured and distributed Thorotrast in Pennsylvania in an essentially unchanged manner from that of Heyden. When Testagar purchased the Thorotrast product line from American Cyanamid, it expressly agreed to assume Thorotrast related liabilities. CPI is, through a series of statutory consolidations and mergers, the current corporate embodiment of Testagar. The foregoing analysis demonstrates that Testagar was liable as the successor in interest to Heyden and American Cyanamid for Thorotrast related liabilities pursuant to the "product line exception". *Dawejko v. Jorgenson Steel Co., supra.* It then follows that CPI, as the corporate embodiment of Testagar by means of statutory mergers and consolidations, is responsible for Testagar liabilities resulting from its continuation of Heyden's Thorotrast product line. Cf., *Husak v. Berkel Inc.,* 234 Pa.Super. 452, 341 A.2d 174 (1975).

Having determined that both TRI and CPI are essentially the corporate embodiments of their predecessors (ultimately, Heyden) and, for the purposes of jurisdiction, liable for their predecessors' acts, we turn to the question of whether due process is offended by subjecting a successor corporation to personal jurisdiction based on the forum related activity of its predecessor.[13] As the following will explain, due process is not offended by subjecting TRI and CPI to personal jurisdiction in the Commonwealth of Pennsylvania.

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13. Pennsylvania's jurisdictional statutes are co-extensive with the Due Process Clause. *Gulentz v. Fosdick,* 320 Pa.Super. 38, 466 A.2d 1049 (1983), appeal after remand 355 Pa.Super. 302, 513 A.2d 440, appeal denied 515 Pa. 580, 583, 527 A.2d 541, 543; 42 Pa.C.S.A. §5308 ("The tribunals of this Commonwealth may exercise jurisdiction under this subchapter only where the contact with this Commonwealth is sufficient under the Constitution of the United States."); 42 Pa.C.S.A. §5322(b).

In *Duris v. Erato Shipping,* 684 F.2d 352 (6th Cir.1982), *aff'd sub nom., Pallas Shipping Agency, Ltd. v. Duris,* 461 U.S. 529, 103 S.Ct. 1991, 76 L.Ed.2d 120 (1983),[14] the Sixth Circuit found that, although the surviving corporation to a merger had never transacted business in Ohio, its constituent corporation had. It further found that under Ohio law, the surviving corporation was liable for all claims against the constituent corporation. *Id.,* at 356. Therefore, the Court concluded that the plaintiff could gain personal jurisdiction over the surviving corporation merely by establishing Ohio contacts sufficient to exercise jurisdiction over the constituent corporation. To quote the *Duris* court, "Any other ruling would allow corporations to immunize themselves by formalistically changing their titles." *Id.,* at 356.

In *Goffe v. Blake,* 605 F.Supp. 1151 (D.Del, 1985), the district court held that the action and conduct of a constituent corporation could be attributed to its successor following a merger for the purpose of determining the successor's amenability to personal jurisdiction for the liability of its predecessor. After so ruling, the court applied the District of Columbia long arm statute and the Due Process Clause to the predecessor corporation. Finding, personal jurisdiction was properly over the predecessor, it logically followed that the successor was amenable to personal jurisdiction in the same location. *Id.,* at 1154-1156 (analysis and holding). *Cf., Bowers v. Neti Technologies,* 690 F.Supp. 349, 361 (E.D. Pa.1988) (If NHF is not subject to personal jurisdiction for its liabilities as successor corporation, corporations will be encouraged to immunize themselves by fleeing the jurisdiction and formalistically changing their names — a result clearly not supported by the Pennsylvania jurisdictional statute, citing 42 Pa.C.S.A. §5301(b)); *United*

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14. We note that the issue now before us which was decided by the 6th Circuit Court of Appeals was not presented to the Supreme Court of the United States.

States v. Bliss, 108 F.R.D. 127, (E.D.Mo.1985) (As foreign successor to corporation which acquired Missouri corporation and its liabilities, nonresident corporation was subject to jurisdiction under Missouri long arm statute).

Similarly, in *Cole v. Caterpillar Machinery Corp.,* 562 F.Supp. 179 (M.D.La.1983), the court held that where a successor corporation to a merger had no contacts with the forum, it could still be subjected to in personam jurisdiction without offending due process requirements since plaintiff's claim arose against its predecessor and that the corporation once had significant contacts with the forum. The court specifically noted that as a result of the merger, the successor had assumed both the liabilities and the assets of its predecessor. Further, the court stated, "Since Americas [successor] could have availed itself of the benefits of the forum in order to sue for monies owed its corporate predecessor, it seems only fair that Americas, deriving benefits from the forum should also be expected to answer for liabilities incurred by the alleged negligent actions of its predecessor." *Id.,* at 180-181.

As previously noted, Judge Wright in *Fehl v. S.W.C. Corp., supra,* held that under Delaware law, personal jurisdiction may be assumed over a successor corporation on the basis of the acts of its predecessor in cases where a merger or continuation has preserved the corporate entity. *Fehl,* 433 F.Supp. at 947. Therein, the issue presented was whether a successor corporation could be subject to personal jurisdiction on the basis of actions taken by a predecessor corporation where the predecessor had sold the successor all the assets relating to a specific line of business rather than merged into the successor. Judge Wright determined that the plaintiff had not met its burden of demonstrating that the successor-defendant had absorbed its predecessor through merger or reorganization, and, consequently,

the successor liability theory of jurisdiction failed. However, we reiterate that in Pennsylvania, successor liability has been expanded to include liability based on continuation of a predecessor's product line. *Dawejko v. Jorgenson Steel Co., supra.* Thus, it is the opinion of this court that if current Pennsylvania successor liability law was applied to the facts presented to the *Fehl* court, the result would mirror the result we reach today with respect to appellant CPI. With respect to appellant TRI, the decision in *Fehl v. S.W.C. Corp., supra,* as it was decided thirteen years ago, continues to support our decision today.

Likewise, in *Maryland National Bank v. Shaffer Stores Co.,* 240 F.Supp. 777, (D.Md.1965), the district court held that personal jurisdiction could be asserted pursuant to the Maryland long arm statute over the surviving corporation to a merger without violating the Due Process Clause. In so ruling, the court specifically *rejected* the defendant's argument that since its sole contact with Maryland was as the successor, by several corporate mergers, to an obligor to a contract entered into in Maryland, it would be a violation of due process to subject it to suit in Maryland. *Id.,* at 779.

In addition, the Court of Appeals of the State of Michigan, in *Wiles v. B.E. Wallace Products Corp.,* 25 Mich.App. 300, 181 N.W.2d 323 (1970), held that a foreign corporation, as the alleged successor in interest to the sole proprietorship which had manufactured and sold the gantry that collapsed with resultant injury to plaintiff, could be subjected to jurisdiction under long arm statute based on its predecessors contact with the state if plaintiff could prove his allegations of fact. Thus, the question of jurisdiction over the foreign successor corporation was erroneously disposed of summarily by the trial court.[15]

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15. The Michigan decision is especially significant as our own general jurisdiction statute, 42 Pa.C.S.A. §5301, was patterned after Michigan statutes, 27A.701, .711, .721 and .731. 42 Pa.C.S.A. §5301, Historical note.

[11-13] However, we emphasize that the acts of a predecessor will not be attributed to its successor when the transaction between the two amounts only to a sale of assets for adequate consideration. *Harris v. Newmand Machine Company, Inc.*, 641 F.Supp. 146 (S.D.Miss. 1986) (Due Process Clause did not permit subjecting foreign corporation which merged with manufacturer to jurisdiction in Mississippi where corporation's only contact with Mississippi was purchase of the assets of predecessor which had sold equipment in forum, and after that time, had no contacts with the forum). See also *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir.1988) (corporate defendant's predecessor's forum contacts would not be attributed to defendant for purposes of jurisdiction, where defendant's predecessor purchased assets from an individual but did not assume any liabilities). This is consistent with our holding today since under Pennsylvania law the general rule of successor liability remains that when a company sells its assets to a successor, the successor does not acquire the liabilities of the transferor merely because of its succession to the transferor's assets. *Knapp v. North American Rockwell, supra; Philadelphia Electric v. Hercules, supra; Dawejko v. Jorgenson Steel Co., supra.* Accordingly, if a successor does not assume either voluntarily or by operation of law the liabilities of its predecessor, then the acts of its predecessor may not be attributed to the successor when answering the question of jurisdiction.

Instantly, it is without question that Heyden could have been subjected to general jurisdiction pursuant to 42 Pa.C.S.A. §5301(a)(2)(iii) and (b), *supra,* for causes of action relating to its Thorotrast product line. Moreover, the same facts could have served as the basis for specific act jurisdiction pursuant to Pennsylvania's long arm statute, 42 Pa.C.S.A. §5322(a)(1), (a)(3), (b). At the time when Mrs. Boyer and Mrs. Simmer were administered Thorotrast at Children's Hospital of Philadelphia, Heyden was the *sole* manufacturer of Thorotrast in the

United States, and Heyden distributed Thorotrast in the Commonwealth of Pennsylvania. Certainly, the Due Process Clause is satisfied as Heyden "purposefully directed" its product Thorotrast at Pennsylvania residents, and the litigation arises directly from the manufacturer and distribution of the drug. *Burger King Corp. v. Rudzewicz,* 471 U.S. at 473-474, 105 S.Ct. at 2182-2183; *Skinner v. Flymo,* 351 Pa. Super. at 242-244, 505 A.2d at 621. Since sufficient "minimum contacts" exist between Heyden and Pennsylvania and those contacts relate directly to the causes of action before us, jurisdiction over TRI was properly exercised by the court below. Likewise, CPI, as successor to Testagar and Heyden, is subject to the personal jurisdiction of Pennsylvania courts, since sufficient "minimum contacts" exist between the subject matter of the litigation, Heyden and the Commonwealth of Pennsylvania.[16] For a similar result see *Bouley v. American Cyanamid Company, supra* (personal jurisdiction over TRI retained).

[14] In holding that the forum-related contacts of a predecessor corporation may be attributed to its successor for jurisdictional purposes when the successor has assumed its predecessor's liabilities, we recognize the realities of modern corporate law and the ever increasing frequency of corporate reorganizations. Plaintiffs must be permitted to establish jurisdiction over a successor corporation based upon its predecessor's contacts with the forum. Otherwise, a corporation which voluntarily or by the operation of law assumes its predecessor's liabilities may be able to avoid the jurisdiction of the very

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16. This is not to say that TRI and CPI ultimately will be liable for appellees' injuries. If Heyden is found liable, then it must be determined who assumed this liability. Among numerous other substantive issues, there are disputes as to the provisions of the Heyden-Tenneco and Heyden-American Cyanamid contracts concerning assumption of liability for Thorotrast related injuries when the administration of the drug occurred before the sale of Thorotrast to American Cyanamid but the personal injury suit was not filed until well after the sale.

forum where the liability accrued simply because it never did business within that forum. This result would be absurd especially when the assets purchased by the successor, at least in part, were derived from the forum and the successor no doubt had knowledge of its predecessor's presence within the forum. Moreover, our holding today recognizes, from a public policy perspective, the nature of products liability actions and their relation to corporate reorganizations. Again, we quote Judge Wright:

> The fact that the predecessor corporation may continue to possess substantial assets may afford protection to the ordinary contract creditors, whose claims are ascertainable at the time of the transfer. It does not necessarily protect products liability plaintiffs, since their claims are contingent and may not arise until long after the corporation is dissolved and its remaining assets distributed . . . . See, Note, "Assumption of Products Liability in Corporate Acquisitions", 55 Boston Law Review 86.

Fehl v. S.W.C. Corp, 433 F.Supp. at 946, n. 10.

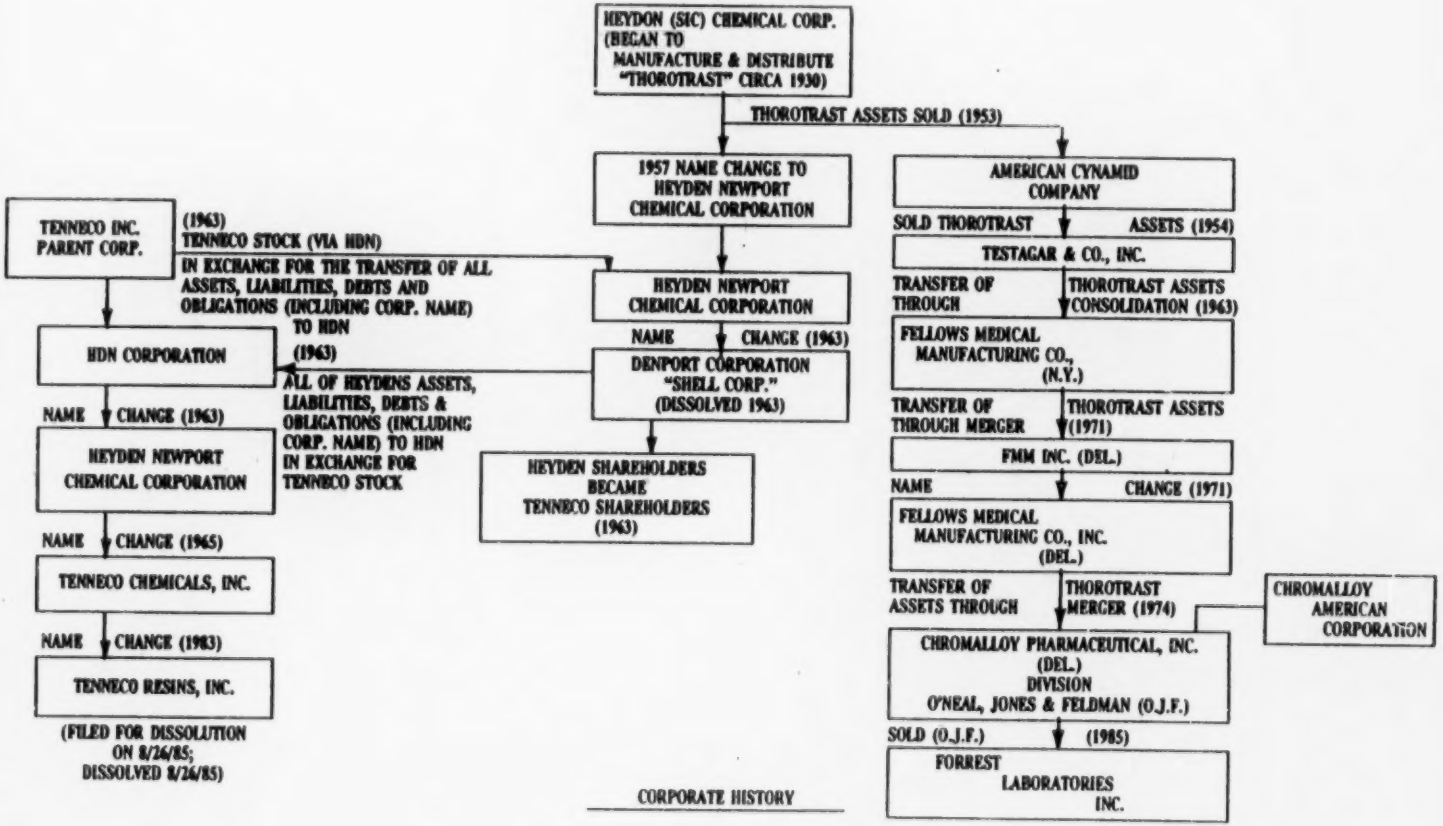
[15.16] When a successor corporation assumes the liabilities of its corporate predecessors, the successor in effect consents to be held liable in the same locations where its predecessor would have been exposed, i.e. consents to the same jurisdictional qualities of its predecessor. The provisions of the Due Process Clause are not violated by imputing the predecessor's actions and forum contacts upon its successor. As stated in *Burger King v. Rudzewicz,* 471 U.S. at 474, 105 S.Ct. at 2183, the critical question is whether "the defendant's conduct and his connection with the forum state are such that he could reasonably anticipate being haled into court there." No doubt in today's sophisticated world of corporate takeovers, a corporation, which assumes another's liabilities or purchases another's product line, seriously considers the possible extent of any liabilitities and where those liabilities may exist. We are convinced that

the traditional notions of "fair play and substantial justice" central to the assertion of jurisdiction are in fact furthered by today's decision.

In sum, we reiterate that successor corporations must be prepared to answer for the acts of their predecessors. A successor which through a merger, consolidation or *de facto* merger is the corporate embodiment of its predecessor must not be permitted to immunize itself in a specific jurisdiction from the liabilities of its predecessor. Likewise, a successor company which purchases and manufactures a predecessor's product line cannot avoid the jurisdiction of those forums wherein the product was previously manufactured and distributed. In Pennsylvania, it is now the law that when the successor is subject to the liabilities of its predecessor, the acts of a predecessor corporation may be attributed to its successor for the purposes of determining whether jurisdiction is proper.

Orders affirmed. Cases remanded for further proceedings. Jurisdiction is relinquished.

APPENDIX A


HEYDON (SIC) CHEMICAL CORP.
(BEGAN TO MANUFACTURE & DISTRIBUTE "THOROTRAST" CIRCA 1930)
THOROTRAST ASSETS SOLD (1953)
1957 NAME CHANGE TO HEYDEN NEWPORT CHEMICAL CORPORATION
AMERICAN CYNAMID COMPANY
SOLD THOROTRAST
ASSETS (1954)
TESTAGAR & CO., INC.
TRANSFER OF THROUGH
THOROTRAST ASSETS CONSOLIDATION (1963)
FELLOWS MEDICAL MANUFACTURING CO., (N.Y.)
TRANSFER OF THROUGH MERGER
THOROTRAST ASSETS (1971)
FMM INC. (DEL.)
NAME
CHANGE (1971)
FELLOWS MEDICAL MANUFACTURING CO., INC. (DEL.)
TRANSFER OF ASSETS THROUGH
THOROTRAST MERGER (1974)
CHROMALLOY AMERICAN CORPORATION
CHROMALLOY PHARMACEUTICAL, INC. (DEL.) DIVISION O'NEAL, JONES & FELDMAN (O.J.F.)
SOLD (O.J.F.)
(1985)
FORREST LABORATORIES INC.
TENNECO INC. PARENT CORP.
(1963) TENNECO STOCK (VIA HDN) IN EXCHANGE FOR THE TRANSFER OF ALL ASSETS, LIABILITIES, DEBTS AND OBLIGATIONS (INCLUDING CORP. NAME) TO HDN
HDN CORPORATION
(1963) ALL OF HEYDENS ASSETS, LIABILITIES, DEBTS & OBLIGATIONS (INCLUDING CORP. NAME) TO HDN IN EXCHANGE FOR TENNECO STOCK
NAME
CHANGE (1963)
HEYDEN NEWPORT CHEMICAL CORPORATION
NAME
CHANGE (1965)
TENNECO CHEMICALS, INC.
NAME
CHANGE (1983)
TENNECO RESINS, INC.
(FILED FOR DISSOLUTION ON 8/26/85; DISSOLVED 8/26/85)
HEYDEN NEWPORT CHEMICAL CORPORATION
NAME
CHANGE (1963)
DENPORT CORPORATION "SHELL CORP." (DISSOLVED 1963)
HEYDEN SHAREHOLDERS BECAME TENNECO SHAREHOLDERS (1963)

CORPORATE HISTORY

SHERRIE SIMMERS,
ET VIR., ETC.

V.

AMERICAN CYANAMID CORP., ET AL. — NOS, 3433 & 3565 PHILA. 1988

ROBERT J. BOYER, ETC.

V.

CHILDREN'S HOSPITAL OF PHILA., ET AL. — NOS. 3434 & 3566 PHILA. 1988

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Philadelphia County be, and the same is hereby AFFIRMED. CASES REMANDED FOR FURTHER PROCEEDINGS. JURISDICTION RELINQUISHED.

BY THE COURT:

David A. Engel

PROTHONOTARY

Dated: June 12, 1990

Supreme Court of Pennsylvania

Eastern District

CHARLES W. JOHNS, ESQ.
PROTHONOTARY

488 CITY HALL
PHILADELPHIA, PA 19107
(215) 560-6370

March 7, 1991

Norbert F. Bergholtz, Esquire
Anthony J. Tamburro, Esquire
Susan L. Oppenheimer, Esquire
DECHERT PRICE & RHOADS
3400 Centre Square West, 1500 Market Street
Philadelphia, PA 19102

RE: ROBERT J. BOYER, Individually and as Executor of the Estate of MARSHA F. BOYER, Deceased v. CHILDREN'S HOSPITAL OF PHILADELPHIA, et al. v. SHERRIE SIMMERS and ROBERT A. SIMMERS, et al. v. AMERICAN CYANAMID COMPANY, et al. PETITION OF: TENNECO RESINS, INC.
NO. 637 E.D. ALLOCATUR DOCKET 1990

Dear Counsel:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"February 22, 1991.

Petition Denied.

Per Curiam."

Very truly yours,

Bernice G. LaBoo,
Chief Clerk

BGL:sm

cc:
Hon. Nicholas M. D'Alessandro
Gary B. Cutler, Esquire
Thomas F. Reilly, Esquire
Cy Goldberg, Esquire
James L. Griffith Esquire
William J. O'Brien, Esquire
Martin M. Krimsky, Esquire
William A. Jones, Esquire

NO. 637 E D ALLOC DKT. 1990

IN THE SUPREME COURT OF PENNSYLVANIA

NO.

ROBERT J. BOYER, individually and as Executor of the Estate of MARSHA F. BOYER, Deceased

v.

CHILDREN'S HOSPITAL OF PHILADELPHIA, HEYDEN PRODUCTS, AMERICAN CYANAMID COMPANY, TENNECO, INC., TENNECO RESINS, INC. (formerly "TENNECO CHEMICAL CO."), FELLOWS MEDICAL MANUFACTURING CO., INC., CHROMALLOY PHARMACEUTICAL, INC., FORREST PHARMACEUTICAL LABORATORIES INC., CHROMALLOY AMERICAN CORPORATION and EUGENE B. SPITZ, M.D.

SHERRIE SIMMERS AND ROBERT A. SIMMERS, W/H AND ROBERT S. SIMMERS, A Minor, By His Parents and Natural Guardians, SHERRIE SIMMERS and ROBERT A. SIMMERS, W/H

v.

AMERICAN CYANAMID COMPANY, TENNECO, INC., TENNECO INC., TENNECO RESINS, INC, FELLOW MEDICAL MANUFACTURING COMPANY, INC. CHROMALLOY AMERICAN CORPORATION, CHROMALLOY PHARMACEUTICAL, INC., FORREST PHARMACEUTICAL LABORATORIES, INC., HEYDEN PRODUCTS, INC., THE CHILDREN'S HOSPITAL OF PHILADELPHIA, RADIOLOGY DEPT OF CHILDREN'S HOSPITAL OF PHILADLEPHIA, C.E. KOOP, M.D. ROVENA SPENSER, M.D., JOSEPH STOKES, JR., M.D.

PETITION FOR ALLOWANCE OF APPEAL OF TENNECO RESINS, INC.

Petition for Allowance of Appeal from the June 12, 1990 Order of the Superior Court at Nos. 3433 and 3434 Philadelphia 1988 which affirmed the Orders of the Court of Common Pleas of Philadelphia County dated October 18, 1988, June Term, 1987 (Simmers) and February Term, 1987, No. 1135 (Boyer)

OF COUNSEL:

Joseph T. C. Hart
Fulton, Duncombe & Rowe
30 Rockefeller Plaza
New York, NY 10112

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Anthony J. Tamburro
Susan L. Oppenheimer
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2507

Attorneys for Petitioner
Tenneco Resins, Inc.

February 22, 1991

PER CURIAM:

Petition denied.

12-1314

COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ROBERT J. BOYER, individually as Executor of the Estate of MARSHA F. BOYER, Deceased	:	February Term, 1987
vs.	:	
CHILDREN'S HOSPITAL OF PHILADELPHIA, et al.	:	NO. 1135

ORDER

AND NOW, this 18th day of October, 1988, upon consideration of Defendant Tenneco Resins, Inc.'s Petition for Reconsideration, supporting memoranda and oral arguments heard thereon, it is hereby ORDERED that the Defendant's Petition for Reconsideration challenging In Personam jurisdiction is DENIED.

BY THE COURT:

D'ALESSANDRO, J.

12-1314

COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ROBERT J. BOYER, individually as Executor of the Estate of MARSHA F. BOYER, Deceased	:	February Term, 1987
vs.	:	
CHILDREN'S HOSPITAL OF PHILADELPHIA, et al.	:	NO. 1135

ORDER

AND NOW, this 18th day of October, 1988, it is hereby ORDERED that Tenneco Resins, Inc.'s Petition for Reconsideration of its Preliminary Objections regarding the question of In Personam jurisdiction presents a substantial, controlling question of both state and constitutional jurisdictional law, one that is a matter of first impression and which warrants immediate appellate review.

BY THE COURT:

D'Alessandro

D'ALESSANDRO, J.

1-2368

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHERRIE SIMMERS and ROBERT A. SIMMERS, W/H, et al.	:	JUNE TERM, 1987
vs.	:	
AMERICAN CYANAMID CORPORATION, et al.	:	NO. 26

ORDER

AND NOW, this 18th day of October, 1988, upon consideration of the Preliminary Objections by Defendant Tenneco Resins, Inc., and the Answer of Plaintiff, all supporting memoranda and oral arguments heard thereon, it is hereby ORDERED that Defendant Tenneco Resins, Inc.'s Preliminary Objections in the nature of a Petition challenging In Personam jurisdiction is DENIED.

It is FURTHER ORDERED that Plaintiff's claims based on industry-wide, enterprise, alternative and/or market share theories of liability are hereby dismissed with prejudice.

It is FURTHER ORDERED that paragraph 46 subparts (m), (n), and (q) of Plaintiff's Complaint be stricken for lack of conformity to law, without prejudice to file an amended more specific pleading.

BY THE COURT:

D'Alessandro

D'ALESSANDRO, J.

1-2368

COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHERRIE SIMMERS and ROBERT A. SIMMERS, H/W, et al.	:	JUNE TERM, 1987
vs.	:	
AMERICAN CYANAMID CORPORATION, et al.	:	NO. 26

ORDER

AND NOW, this 18th day of October, 1988, it is hereby ORDERED that Tenneco Resins, Inc.'s Preliminary Objections regarding the question of In Personam jurisdiction presents a substantial, controlling question of both state and constitutional jurisdictional law, one that is a matter of first impression and which warrants immediate appellate review.

BY THE COURT:

D'Alessandro

D'ALESSANDRO, J.

42 Pa. Cons. Stat.

§ 5301. Persons

(a) **General rule.** – The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

(1) Individuals. –

(i) Presence in this Commonwealth at the time when process is served.

(ii) Domicile in this Commonwealth at the time when process is served.

(iii) Consent, to the extent authorized by the consent.

(2) Corporations. –

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

(3) Partnerships, limited partnerships, partnership associations, professional associations, unincorporated associations and similar entities. –

(i) Formation under or qualification as a foreign entity under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

(b) **Scope of jurisdiction.** – When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section. Discontinuance of the acts enumerated in subsection (a)(2)(i) and (iii) and (3)(i) and (iii) shall not affect jurisdiction with respect to any act, transaction or omission occurring during the period such status existed.

42 Pa. Cons. Stat.

§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth

(a) **General rule.** – A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by any agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing

an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

(5) Having an interest in, using, or possessing real property in this Commonwealth.

(6) (i) Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.

(ii) Being a person who controls, or who is a director, officer, employee or agent of a person who controls, an insurance company incorporated in this Commonwealth or an alien insurer domiciled in this Commonwealth.

(iii) Engaging in conduct described in section 504 of the act of May 17, 1921 (P.L. 789, No. 285), known as "The Insurance Department Act of 1921."

(7) Accepting election or appointment or exercising powers under the authority of this Commonwealth as a:

(i) Personal representative of a decedent.

(ii) Guardian of a minor or incompetent.

(iii) Trustee or other fiduciary.

(iv) Director or officer of a corporation.

(8) Executing any bond of any of the persons specified in paragraph (7).

(9) Making application to any government unit for any certificate, license, permit, registration or similar instrument or authorization or exercising any such instrument or authorization.

(10) Committing any violation within the jurisdiction of this Commonwealth of any statute, home rule charter, local ordinance or resolution, or rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit.

(b) **Exercise of full constitutional power over non residents.** – In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the constitution of the United States.

(c) **Scope of Jurisdiction.** – When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

(d) **Service outside this Commonwealth.** – When the exercise of personal jurisdiction is authorized by this section, service of process may be made outside this Commonwealth.

(e) **Inconvenient forum.** – When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

Del. Code Ann. tit. 8 § 251. Merger or consolidation of domestic corporations.

(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) in the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation; (4) in the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement; (5) the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation and, if any shares of any of the constituent corporations are not to be converted solely into shares or other securities of the surviving or resulting corporation, the cash, property, rights or securities of any other corporation which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and (6) such other details or provisions as are deemed

desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with § 155 of this title. The agreement so adopted shall be executed and acknowledged in accordance with § 103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each holder of stock, whether voting or nonvoting, of the corporation at his address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof, as the directors shall deem advisable. At the meeting, the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation. If the agreement shall be so adopted and certified by each constituent corporation, it shall then be filed and shall become effective, in accordance with § 103 of this title. It shall be recorded in the office of the recorder of the county of this State in which the registered office of each such constituent corporation is located; or if any of the constituent corporations shall have been specially created by a public act of the General Assembly, then the agreement shall be recorded in the county where such corporation

had its principal place of business in this State. In lieu of filing and recording the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with § 103 of this title which states:

(1) The name and state of incorporation of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with this section;

(3) The name of the surviving or resulting corporation;

(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, of no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at the principal place of business of the surviving corporation, stating the address thereof; and

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the filing of

the agreement (or a certificate in lieu thereof) with the Secretary of State, the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations. Any agreement of merger or consolidation may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time prior to the filing of the agreement (or a certificate in lieu thereof) with the Secretary of State, provided that an amendment made subsequent to the adoption of the agreement by the stockholders of any constituent corporation shall not (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such constituent corporation, (2) alter or change any term of the certificate of incorporation of the surviving corporation to be effected by the merger or consolidation, or (3) alter or change any of the terms and conditions of the agreement if such alteration or change would adversely affect the holders of any class or series thereof of such constituent corporation.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3)

either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20% of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger. No vote of stockholders of a constituent corporation shall be necessary to authorize a merger or consolidation if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection, and, (i) if it has been adopted pursuant to the first sentence of this subsection, that the conditions specified in that sentence have been satisfied, or (ii) if it has been adopted pursuant to the second sentence of this subsection, that no shares of stock of such corporation were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

Del. Code Ann. tit. 8 § 271. Sale, lease or exchange of assets; consideration; procedure.

(a) Every corporation may at any meeting of its board of directors or governing body sell, lease or exchange all or substantially all of its property and assets, including its goodwill and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or other property, including shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors or governing body deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon or, if the corporation is a non-stock corporation, by a majority of the members having the right to vote for the election of the members of the governing body, at a meeting duly called upon at least 20 days' notice. The notice of the meeting shall state that such a resolution will be considered.

(b) Notwithstanding authorization or consent to a proposed sale, lease or exchange of a corporation's property and assets by the stockholders or members, the board of directors or governing body may abandon such proposed sale, lease or exchange without further action by the stockholders or members, subject to the rights, if any, of third parties under any contract relating thereto.

THE STATE OF OHIO COUNTY OF CUYAHOGA	ss:	IN THE COURT OF COMMON PLEAS
JOSEPH A. TANGO, et al., Plaintiffs, vs. THE CLEVELAND CLINIC FOUNDATION, et al., Defendants.		CASE NO. 95606 JUDGE RALPH A. McALLISTER **JUDGMENT ENTRY**

This matter came on for consideration by the Court on the *Motion for Reconsideration* filed by the defendant, Tenneco Resins, Inc. ("Tenneco"). Tenneco seeks reconsideration of this Court's order dated December 16, 1985 (Vol. 831, Page 389) overruling Tenneco's Motion to Dismiss and/or Motion to Quash Service of plaintiffs' Complaint. The Court, upon consideration of the instant motion, the briefs and exhibits filed by the parties, and the record, makes the following determination.

Turning first to the Motion to Quash Service, on August 26, 1985, a copy of the summons and plaintiffs' Complaint was served on Tenneco's former statutory agent, CT Corporation, by certified mail. Approximately one and one-half (1½) years earlier, on November 23, 1983, Tenneco, a foreign corporation, surrendered its license to do business in The State of Ohio pursuant to R.C. §1703.17.

R.C. §1703.19 provides that the Secretary of State of The State of Ohio is the "agent" for service of process upon a foreign corporation which has surrendered its license to do business under R.C. §1703.17.

In the case at bar, plaintiffs did not attempt to serve Tenneco with a copy of the summons and Complaint via the Secretary of State or at any of Tenneco's usual places of business (see Civil Rule 4.2(6)). Plaintiffs attempted to serve Tenneco through its former statutory agent, CT Corporation, after Tenneco had surrendered its Ohio license to do business.

From the foregoing, the Court finds that Tenneco was improperly served with a copy of the summons and plaintiffs' Complaint in violation of Civil Rule 12(B)(5). Accordingly, the Court finds that service of plaintiff's Complaint on Tenneco should be quashed. However, the Court's following finding makes reservice of plaintiffs' Complaint on Tenneco unnecessary.

Turning to Tenneco's Motion to Dismiss, Tenneco moves to dismiss plaintiffs' Complaint pursuant to Civil Rule 12(B)(2) for lack of in personam jurisdiction. Tenneco asserts that it does not have sufficient "minimum contacts" with The State of Ohio pursuant to the Ohio long-arm statute (R.C. 2307.382) and the due process guarantee of the Fourteenth Amendment to the U. S. Constitution such that an Ohio court may exercise personal jurisdiction over Tenneco and force it to defend suit in Ohio.

In the case at bar, plaintiff alleges personal injuries resulting from the injection of a drug called "Thorotrast" into his spine in 1941 by defendant, Cleveland Clinic Foundation. Thorotrast was manufactured by Heyden Newport Chemical Corp. (also known as Heyden Chemical Corp., hereinafter "HCC") until 1953, when it was sold along with HCC's entire Antibiotic Division to American Cyanamid Co. ("ACC").

Tenneco is a Delaware corporation currently undergoing dissolution in Delaware. On October 4, 1963, Tenneco entered into a written agreement with HCC whereby Tenneco acquired the existing assets (not including the drug "Thorotrast") and liabilities of HCC. The HCC liabilities Tenneco acquired seem to include any liabilities arising from HCC's manufacture of Thorotrast prior to its sale to ACC in 1953 (*See* §5.3 of agreement at page 10). Tenneco has never manufactured or sold Thorotrast in Ohio or anywhere else.

Although Tenneco has done business in The State of Ohio in the past, Tenneco ceased doing business in The State of Ohio on or about December 22, 1982, and

surrendered its Ohio license to do business on November 28, 1983, all prior to the filing of plaintiffs' Complaint. It is undisputed that Tenneco's doing business contacts in the State of Ohio did not give rise to plaintiffs' alleged injuries.

However, plaintiffs argue that the "transacting business contacts" Tenneco's predecessor corporation, HCC, had with The State of Ohio when it sold the "Thorotrast" drug to the Cleveland Clinic should be imposed on Tenneco for the purposes of asserting long-arm in personam jurisdiction over Tenneco. Plaintiffs maintain that because Tenneco expressly assumed HCC's liabilities arising out of the manufacture and sale of Thorotrast prior to 1953 by its October 4, 1963 written agreement with HCC, the "minimum contacts" of HCC with Ohio should be attributed to Tenneco for the purposes of asserting long-arm jurisdiction.

The Ohio courts have held that after a statutory merger or consolidation occurs (See R.C. 1701.82), the jurisdictional contacts of a predecessor corporation may be imposed on the surviving corporation for purposes of asserting long-arm jurisdiction over the surviving corporation. *Duris v. Erato Shipping, Inc.*, 684 F. 2d 352, 356 (6th Cir. 1982). The *Duris* Court reasoned that any other ruling would allow corporations to immunize themselves from defending suits in certain jurisdictions by "formalistically changing their titles." *Id.*

In the case at bar, the Court finds that Tenneco's October 4, 1963 purchase of HCC's existing assets and liabilities does not rise to a consolidation under Ohio law because no new corporation was formed by the transaction. Furthermore, the Court finds that the transaction does not rise to a statutory merger because HCC was not absorbed into Tenneco, but continued in business.

Because Tenneco's October 4, 1963 purchase of HCC's existing assets and liabilities was not a statutory merger or consolidation, the Court finds that HCC's jurisdictional contacts with The State of Ohio may not

be imposed on Tenneco for the purposes of asserting long-arm jurisdiction over Tenneco.

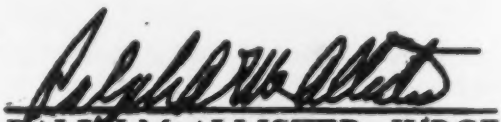
As none of Tenneco's doing business contacts in The State of Ohio gave rise to plaintiffs' alleged injuries, the Court further finds that Tenneco does not have sufficient "minimum contacts" with The State of Ohio pursuant to the Ohio long-arm statute (R.C. 2307.382) and the due process guarantee of the Fourteenth Amendment to the U. S. Constitution such that an Ohio court may exercise personal jurisdiction over Tenneco.

Plaintiffs are still free to bring their cause of action against Tenneco in those jurisdictions in which it is amenable to suit. However, under the facts presented, plaintiffs cannot force Tenneco to defend suit in Ohio.

For the foregoing reasons, the Court finds Tenneco's Motion for Reconsideration is well taken and is hereby granted. The Order of this Court dated December 16, 1985 overruling Tenneco's Motion to Dismiss and/or Motion to Quash Service of plaintiffs' Complaint is vacated and, accordingly, Tenneco's Motion to Quash Service of plaintiffs' Complaint and Motion to Dismiss plaintiffs' Complaint for lack of in personam jurisdiction are granted.

Plaintiffs' action will proceed against the remaining defendant, Cleveland Clinic Foundation.

IT IS SO ORDERED.



RALPH McALLISTER, *JUDGE*

DATED: April 2, 1986